

Attorney Docket No.: J6860(C)  
Serial No.: 10/682,657  
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**BRIEF FOR APPELLANT**

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**I. REAL PARTY IN INTEREST**

The Real Party in Interest in this Appeal is Unilever Home & Personal Care USA, a Division of Conopco, Inc., a corporation of the State of New York.

**II. RELATED APPEALS AND INTERFERENCES**

Neither the Appellants, their legal representatives nor the Assignee are aware of any other Appeals or Interferences relating to the present Appeal.

**III. STATUS OF CLAIMS**

This Appeal is taken from the Final Rejection of claims 1 through 20, the pending claims in the application. A copy of the appealed claims is attached to this Brief as an Appendix.

#### IV. STATUS OF AMENDMENTS

An Amendment and Reply after the Final Rejection was filed on August 1, 2006, pursuant to 37 CFR §1.116. The Amendment, which was meant to cancel claim 20, raised no new issues but does not appear to have been entered by the Examiner.

#### V. SUMMARY OF THE CLAIMED SUBJECT MATTER

The inventions set forth in the claims on appeal are directed to skin care and/or cleansing compositions having flat platy crystalline particles and providing skin radiance. Independent claim 1 describes a superior skin care or cleansing composition having solid single-crystal, flat platy particles whereby the composition has an opacity of less than 20%. Independent claim 1 is further defined by the dependent claims which, for example, further characterize the platy particles and address the addition of a skin benefit agent like a hydroxy acid and/or a retinoid.

Independent claim 16 is directed to a composition that consists essentially of solid single-crystal, flat platy particles whereby the composition is non-pigmented or colorless. Claim 16 is further characterized by dependent claims which, for example, further characterize the platy particles.

By the presently claimed invention, therefore, superior skin care compositions have been prepared. The skin care compositions surprisingly result in consumer desired optical properties of radiance, without opacifying natural skin color. Thus, as may be readily gleaned from the Examples in the specification, the claimed compositions unexpectedly result in reflective radiance when being used.

In the Specification, the portion at page 1 is background. The phraseology used in independent claims 1 and 16 may be found, for example, on pages 2 and 3 of the specification as originally filed. The dependent claims are supported by the language of the specification found at, for example, pages 4-10. Beginning at page 15, working examples illustrate the unexpected and superior properties obtained when using the compositions of this invention.

## VI. GROUNDS OF THE REJECTION TO BE REVIEWED ON APPEAL

The issues raised in this appeal are primarily ones of fact and of the type normally encountered in connection with rejections made under 35 USC § 103. In particular, the issues are as follows:

I. Would one of ordinary skill in the art, upon reading Cohen et al., U.S. Patent Application No. 2004/0120908, find claims 1-9, 11-13 and 15-20 obvious;

II. Would one of ordinary skill in the art, upon reading Cohen et al., U.S. Patent Application No. 2004/0120908 in view of Dreher, U.S. Patent Application No. 2003/0157041 or Miyazaki et al., U.S. Patent No. 6,482,419, find claim 10 obvious; and

III. Would one of ordinary skill in the art, upon reading Cohen et al., U.S. Patent Application No. 2004/0120908 in view of Tan et al., U.S. Patent No. 6,511,672, find claims 13 and 14 obvious?

## VII. ARGUMENT

### Response to the Examiner's Arguments In The Final Rejection

Appellant, again, wishes to point out that the present inventions are directed to a skin care or cleansing composition comprising from about 0.01% to about 1% by weight solid single-crystal, flat, platy particles, where the particles have an index of refraction of about 1.8 to about 2.2. The compositions have an opacity of less than about 20%.

In contrast, the '908 reference is directed to cosmetic compositions having essential transparent components and a non-interference platelet component that exhibits a light transmission value from about 20% to no greater than about 70%. The transmission values taught in the '908 reference for powder compositions and liquid compositions is about 30 to 70% and about 20 to about 70%, respectively. These values are for compositions (please see the '908 reference at 0010) and the claimed compositions of the present invention have a capacity of less than about 20% and thus a transmission value of 80% or more. Appellant submits that no other transmission values are suggested by the '908 reference, and therefore, the reference teaches away from the claimed invention.

Appellant further submits that nowhere has "about" ever been adjudicated to mean anything other than permitting tolerance. It does not indicate a lack of critically as suggested by the Examiner. Finally, slightly over 70% light

transmission does not meet the limitation of an opacity of less than 20% and an opacity of less than about 10% as claimed in the present invention. Slightly over 70% light transmission is not, for example, 80% or more light transmission or 90% or more light transmission.

Rejection Under 35 USC §103

The Examiner has, again, maintained the rejection of claims 1-9, 11-13 and 15-20 under 35 USC §103 as being unpatentable over Cohen et al., U.S. Patent Application No. 2004/0120908 (hereinafter, '908). In the rejection, the Examiner maintains, in summary, that the '908 reference teaches transparent sealing cosmetic compositions containing non-interference platelet particles having an average particle size of 25 microns or less. The Examiner further maintains that the platelet particles can include bismuth oxychloride particles. The Examiner mentioned that the composition described in the '908 reference may be used for any type of cosmetic product, like a color cosmetic or a cosmetic treatment product. Finally, the Examiner maintains that the compositions described in the '908 reference can include standard optional additives, like anti-oxidants and vitamins, and that the presently claimed opacity of less than 20% is inherent in the '908 reference because the reference describes transparent compositions. In view of this, the Examiner, again, believes that the obviousness rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellant's position, again, that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the present invention, as set forth in independent claim 1, is directed to a skin care or cleaning composition comprising from about 0.01% to about 1% by weight of solid single-crystal, flat, platy particles, the particles having an index refraction from about 1.8 to about 2.2; and a cosmetically acceptable vehicle, wherein the composition has an opacity of less than about 20%.

The invention of claim 1 is further defined by the dependent claims, which claim, among other things, that the opacity can be less than 10%, that the platy particles can include bismuth oxy-chloride, aluminum oxide, zirconium oxide, boron nitride, crystals of solid phase solutions, or mixtures thereof, specific platy particle diameters, that the composition can be leave on or wash off, and specific amounts of platy particles within the composition. Still further, the claimed invention, as described in independent claim 1, is further characterized as one comprising a skin benefit agent, wherein the skin benefit agent can be a retinoid, essential fatty acid, alpha hydroxy acid, beta hydroxy acid, polyhydroxy acid, skin lightening agent or mixtures thereof. Even further, the presently claimed invention is directed to a method for imparting a radiant skin appearance by applying the composition of claim 1 to the skin.

Independent claim 16 is directed to a skin care composition consisting essentially of about 0.01% to about 1% by weight of solid single-crystal, flat, platy particles, the particles having an index of refraction of about 1.8 to about 2.2; and a cosmetically acceptable vehicle wherein the composition has an opacity of less than about 20% and further wherein the composition is non-pigmented or colorless. The invention of claim 16 is further defined by the

dependent claims which claim, among other things, the type of platy particles that may be employed, and the size of the platy particles.

In contrast, the '908 reference, again, is merely directed to a topical composition for applying to the skin wherein the topical composition comprises a transparent component and a non-interference platelet component that exhibits a light transmission value from about 20% to about 70%. (Please see paragraph 0005). Moreover, the second component, i.e., the platelet component, is a platy material that provides a continuous sheetlight, reflective finish rather than a sparkling, discontinuous shine. The '908 reference teaches away from the presently claimed invention since the presently claimed invention is directed to a composition having an opacity of less than about 20%, and therefore, a light transmission value of 80% or more (achieved by using single-crystals with smooth crystal reflective facets as defined in the specification at page 6). Note that the transmission values of the powder and liquid composition described in the '908 reference are up to about 70% (Please see '908 reference at 0010). Moreover, in paragraph 0016 of the '908 reference, it is taught that the ingredients used in the formula should in combination exhibit a light transmission value from 20-70%. Furthermore, the particles employed in the presently claimed invention have an index of refraction of about 1.8 to about 2.2. These particles are single-crystal, flat, platy particles. No such requirements are even remotely suggested or required in the compositions described in the '908 reference.

As set forth in paragraph 0008 of the '908 reference, the compositions described are base compositions for any type of cosmetic product that can have color or treatment agents. The presently claimed composition is an end use composition

to be used to enhance skin radiance, yielding to the consumer a natural skin finish. It is not a base/filler composition.

In view of the above, it is clear that all the important and critical limitations set forth in the presently claimed invention are not found in the '908 reference. Therefore, the obviousness rejection should be withdrawn and rendered moot.

Rejection Under 35 USC §103

The Examiner has maintained the rejection of claim 10 under 35 USC §103 as being unpatentable over Cohen et al., U.S. Patent Application No. 2004/0120908 (hereinafter, '908) in view of Dreher, U.S. Patent Application No. 2003/0157041 (hereinafter, '041) or Miyazaki et al., U.S. Patent No. 6,482,419 (hereinafter, '419). In the rejection, the Examiner maintains, in summary, that the '908 reference is being applied as above. The Examiner admits that the '908 reference does not explicitly teach a particle suspended in a polar solvent prior to incorporation into the composition. Nevertheless, the Examiner attempts to "cure" the vast deficiencies of the '908 reference by relying on the '041 reference for mentioning the use of butylene glycol as a polar solvent. Moreover, the Examiner relies on the '419 reference for also mentioning the use of butylene glycol as a polar solvent when making a cosmetic composition. In view of this, the Examiner believes that the obviousness rejection to claim 10 is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellant's position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the presently claimed invention is directed to a superior skin care or cleaning composition having about 0.01% to about 1% by weight of solid single-crystal, flat, platy particles wherein the particles have an index of refraction from about 1.8 to about 2.2. The composition further comprises a cosmetically acceptable vehicle and the composition has an opacity of less than about 20% (i.e., a transmission value of 80% or more). The invention is further defined by dependent claim 10 which claims, among other things, that the platy particles are suspended in a polar solvent prior to incorporation into the composition.

In contrast, and as already made of record, the '908 reference teaches away from the presently claimed invention since the same is a base for cosmetic products whereby the composition exhibits a light transmission value in the range of from about 20 to about 70% (i.e., an opacity from about 30 to about 80%). Furthermore, and as already made of record, the '908 reference teaches away from the presently claimed invention since it does not describe the use of single-crystal, flat platy particles having an index of refraction from about 1.8 to about 2.2. In fact, in paragraph 0010 of the '908 reference, platy materials that provide a continuous sheet-like reflective finish are described.

Neither the '041 reference nor the '419 reference "cure" any of the vast deficiencies of the '908 reference. This is true because the '041 reference is merely directed to a make-up composition having an interference pigment with a blue or violet reflectance. Turning to the '419 reference, the same is directed to an inorganic composite powder wherein the refractive index of inorganic oxide used for forming the utmost outer layer is 1.73 or less. Clearly, none of the teachings of the secondary references even remotely cure the vast deficiencies

of the '908 reference. Therefore, Appellant respectfully submits that a *prima facie* case of obviousness has not been established and that the rejection made under 35 USC § 103 should be withdrawn and rendered moot.

Rejection Under 35 USC §103

The Examiner has maintained the rejection of claims 13 and 14 under 35 USC § 103 as being unpatentable over Cohen et al., U.S. Patent Application No. 2004/0120908 (hereinafter, '908) in view of Tan et al., U.S. Patent No. 6,511,672 (hereinafter '672).

In the rejection, the Examiner maintains, in summary, that the '908 reference is applied as above. The Examiner continues by mentioning that the '908 reference doesn't explicitly teach the use of specific benefit agents as claimed. Nevertheless, the Examiner attempts to "cure" the vast deficiencies of the '908 reference by relying on the '672 reference which mentions the use of additives like vitamin A, retinol, vitamin C, hydroxy acids and the like. In view of this, the Examiner believes that claims 13 and 14 are properly rejected under 35 USC § 103.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellant's position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

Again and as already made of record, the present invention, as set forth in independent claim 1, is directed to a skin care or cleansing composition with 0.1 to 1% by weight of a solid single-crystal, flat, platy particle, the particle having

an index of refraction from about 1.8 to about 2.2 and a cosmetically acceptable vehicle wherein the composition has an opacity of less than about 20% (i.e., a transmission value of 80% or more). The invention of claim 1 is further defined by the dependent claims which claim, among other things, the types of skin benefit agents that may be employed (e.g., retinoids, fatty acids, hydroxy acids, skin lightening agents, retinol, linoleic acid, glycolic acid, lactic acid, hydroxy octanoic acid, salicylic acid, ferulic acid, sebacic acid or the like).

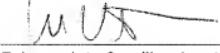
In contrast, and as already made of record, the '908 reference does not, even remotely, describe a composition having single-crystal, flat, platy particles with an index of refraction as claimed. Moreover, the '908 reference does not describe a skin care or cleaning composition having an opacity of less than about 20%. Again, the '908 reference is directed to a composition having a transmission value of 20-70%, and therefore, an opacity of 30-80%. The composition of the '908 reference also describes the use of platy materials that provide a continuous sheet-like reflective finish and not single-crystals as claimed. Again, none of the important and critical limitations set forth in the presently claimed invention are taught or suggested in the '908 reference. The '672 reference, on the other hand, does not "cure" any of the vast deficiencies of the '908 reference since the '672 reference only describes a composition having a pigment with a first platelet of alumina treated with a metal oxide and blended with at least one second platelet treated with at least one spherical scattering component. None of the vast deficiencies of the '908 reference are even remotely cured by the '672 reference. In view of this, Appellant, again, respectfully requests that the obviousness rejection be withdrawn and rendered moot.

Appellant respectfully submits that all claims of record are now in condition for allowance. Reconsideration and favorable action are earnestly solicited.

VIII. CONCLUSION

Appellant respectfully requests that the Board of Patent Appeals and Interferences reverse the Examiner's final rejection of claims 1-20 under 35 U.S.C. 103.

Respectfully submitted,

  
Edward A. Squillante, Jr.  
Registration No. 38,319  
Agent for Appellant(s)

EAS/pod  
(201) 894-2925

## IX. CLAIMS APPENDIX

1. A skin care or cleansing composition comprising:
  - (a) about 0.01 % to about 1 % by weight of said composition of solid single-crystal, flat, platy particles;  
said particles having an index of refraction of about 1.8 to about 2.2;  
and
  - (b) a cosmetically acceptable vehicle;  
wherein said composition has an Opacity of less than about 20%.
2. The composition of claim 1 having an Opacity of less than about 10 %.
3. The composition of claim 1, wherein said platy particles are selected from the group consisting of bismuth oxy-chloride, aluminum oxide, zirconium oxide, boron nitride, crystals of solid phase solutions, and mixtures thereof.
4. The composition of claim 1, wherein said platy particles are bismuth oxy-chloride.
5. The composition of claim 1, wherein said platy particles have a particle diameter of about 10 micro-meters to about 30 micro-meters.

6. The composition of claim 1, wherein said platy particles have a particle thickness of about 0.1 micro-meters to about 5 micro-meters.
7. The composition of claim 1, that is a leave-on or wash-off composition.
8. The composition of claim 1, wherein said platy particles comprise about 0.05 % to about 0.5 % by weight of said composition.
9. The composition of claim 1, wherein said platy particles comprise about 0.1 % by weight of said composition.
10. The composition of claim 1, wherein said platy particles are contained suspended in a polar solvent prior to incorporation in said composition.
11. The composition of claim 1, further comprising a skin benefit agent.
12. The composition of claim 11, wherein the amount of said skin benefit agent is at least about 0.0001% by weight of the composition.
13. The composition of claim 11 wherein the skin benefit agent is selected from the group consisting of retinoids, essential fatty acids, alpha-hydroxy acids, beta-hydroxy acids, poly-hydroxy acids, skin lightening agents, and mixtures thereof.
14. The composition of claim 11 wherein said skin benefit agent is selected from the group consisting of retinol, linoleic acid, glycolic acid, lactic

acid, 2-hydroxyoctanoic acid, salicylic acid, ferulic acid, sebacic acid, and combinations thereof.

15. A method of imparting radiant skin appearance by applying to the skin the composition of claim 1.

16. A cosmetic skin care composition consisting essentially of:

(a) about 0.01 % to about 1 % by weight of the composition of solid single-crystal, flat, platy particles;

    said particles having an index of refraction of about 1.8 to about 2.2; and

(b) a cosmetically acceptable vehicle;

    wherein the composition has an Opacity of less than about 20%; and

    wherein said composition is non-pigmented or colorless.

17. The composition of claim 16, wherein said platy particles are selected from the group consisting of bismuth oxy-chloride, aluminum oxide, zirconium oxide, boron nitride, crystals of solid phase solutions, and mixtures thereof.

18. The composition of claim 16, wherein said platy particles are bismuth oxy-chloride.

19. The composition of claim 16, wherein said platy particles have a particle diameter of about 10 micro-meters to about 30 micro-meters.
20. The composition of claim 1, wherein said platy particles have a particle thickness of about 0.1 micro-meters to about 5 micro-meters.

**X. EVIDENCE APPENDIX**

No evidence pursuant to §§ 1.130, 1.131 and/or 1.132 is/are submitted herewith.

**XI. RELATED PROCEEDINGS APPENDIX**

No decisions rendered by a Court or the Board have been made; therefore, no such decisions are submitted herewith.